



**IN THE MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**JANA KIVLAND and KRISTIN K. BOLD,** )

**Appellants,** )

**v.** )

**COLUMBIA ORTHOPAEDIC GROUP, LLP, and ROBERT GAINES, M.D.,** )

**Respondents.** )

**WD70774**

**OPINION FILED:  
December 22, 2009**

**Appeal from the Circuit Court of Boone County, Missouri  
The Honorable Gary M. Oxenhandler, Judge**

**Before Division III:** Karen King Mitchell, Presiding Judge, and  
James E. Welsh and Mark D. Pfeiffer, Judges

Appellants Jana Kivland and Kristin Bold appeal the judgment of the Circuit Court of Boone County (trial court) sustaining respondents Columbia Orthopaedic Group's (COG) and Dr. Robert Gaines's (Gaines) motion for partial summary judgment dismissing appellants' claims for wrongful death and lost chance of survival. Appellants raise two points on appeal. In their first point, appellants contend that the trial court erred because there were disputed issues of fact as to whether Gerald Kivland's (Kivland) suicide was proximately caused by Gaines's negligence. In their second point, appellants argue that the trial court erred in sustaining the motion because the ruling violates

the open courts provision of the Missouri Constitution by unreasonably restricting a recognized cause of action. We affirm.

### **Statement of Facts**

The facts, in the light most favorable to the non-moving party, *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993), are as follows. On January 10, 2005, Gaines, a surgeon employed by COG, surgically operated on Kivland's spine to correct curvature of his spine. Tragically, following that surgery, Kivland was paralyzed from the waist down. On July 22, 2005, Kivland filed a lawsuit alleging medical malpractice. In addition to paralysis, Kivland's lawsuit alleged that the negligently performed surgery also caused Kivland significant and chronic pain in the paralyzed region. To combat that pain, doctors attempted a variety of treatment regimens, including increasingly aggressive painkillers, such as Neurontin, Oxycontin, Baclofen, and Methadone. When these treatment measures did not succeed, doctors surgically implanted a morphine pump into Kivland on February 10, 2006. This measure also failed to provide sustained relief and on March 9, 2006, using a gun he had purchased for that purpose, Kivland committed suicide outside of his Florida condominium.

The lawsuit was then amended to name Jana Kivland, Kivland's wife, as the representative of his estate and added counts for wrongful death and lost chance of survival, claims pursued by Jana Kivland and Kristin Bold, the Kivlands' daughter. Gaines and COG filed a motion for partial summary judgment, alleging that Kivland's suicide was an independent intervening act and that, as a matter of law, Gaines and COG could not be legally responsible for his death. Dr. Michael Jarvis, the Chief Medical Director of Inpatient Psychiatry at Barnes-Jewish Hospital in St. Louis, Missouri, testified on behalf of appellants that Kivland's suicide was involuntary. The initial motion for partial

summary judgment was denied on April 15, 2008. On September 19, 2008, respondents filed a motion to strike plaintiffs' expert witness. On November 19, 2008, the trial court sustained the motion to strike and ruled that Dr. Jarvis would be precluded from testifying at trial as to issues relating to the voluntariness of Kivland's suicide.<sup>1</sup> There was no other evidence presented to the trial court that Kivland's suicide was involuntary. Consequently, respondents renewed their motion for partial summary judgment. The trial court sustained the motion for partial summary judgment on March 4, 2009. The trial court certified the judgment for appeal. This timely appeal followed.

### **Jurisdictional Question**

Although neither party questions the authority of the trial court to certify this partial summary judgment for appeal, because it creates a question of whether this case is properly before this court, we examine it *sua sponte*. *Kunkel v. Hertzog*, 176 S.W.3d 171, 173 (Mo. App. W.D. 2005). Unless specifically authorized by statute, only final judgments are eligible for appeal. *Id.*; § 512.020 RSMo. Cum. Supp. 2004. An exception to this rule can be found in Rule 74.01(b).<sup>2</sup> This rule allows a trial judge to certify a partial summary judgment for appeal when the judgment fully resolves one or more claims in a case that involves multiple claims. Rule 74.01(b). To certify the judgment for appeal, the trial court must note that "there is no just reason for delay." *Id.* The trial court's certification is not binding on this court, and we must examine the order to determine if it is final and appealable. *Kunkel*, 176 S.W.3d at 174.

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<sup>1</sup> Appellants did not seek a writ of prohibition with regard to the trial court's ruling on the motion to strike. The issue of the propriety of the trial court's ruling striking Jarvis's testimony is not an issue before this court. However, our ruling today discusses the rationale and propriety of the trial court's discretionary ruling as to Jarvis's testimony since it is relevant to our decision to affirm the trial court's judgment sustaining the motion for partial summary judgment.

<sup>2</sup> All rule references are to Missouri Rules of Civil Procedure, 2009, unless otherwise indicated.

For a partial summary judgment to be appealable, it must dispose of a “distinct ‘judicial unit.’” *Id.* (quoting *Gibson v. Brewer*, 952 S.W.2d 239, 244 (Mo. banc 1997)). A distinct judicial unit is one that requires the application of distinguishable law to different facts than are operative for the surviving claims. *Neely v. Neely*, 169 S.W.3d 577, 579 n.2 (Mo. App. W.D. 2005).

In the current case, the trial court designated this as a judgment and noted that “there was no just reason for delay.” Furthermore, the claims of wrongful death and lost chance of survival require examination of different facts and application of different law than the surviving claims. Consequently, the adjudicated claims comprise a distinct judicial unit and appellate review of the partial summary judgment is appropriate under Rule 74.01(b).

#### **Standard of Review**

When considering an appeal from summary judgment, our review is essentially *de novo*. *Larabee v. Eichler*, 271 S.W.3d 542, 545 (Mo. banc 2008). Summary judgment, or partial summary judgment, is only appropriate when “there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.” *Id.* (quoting *White v. Zubres*, 222 S.W.3d 272, 274 (Mo. banc 2007)); Rule 74.04(c)(6). Our review of the record is in the light most favorable to the non-moving party. *ITT Commercial Fin.*, 854 S.W.2d at 376. The facts, including all reasonable inferences from those facts, are viewed to the benefit of the party against whom judgment was entered. *Id.* However, after the moving party has made a *prima facie* showing that it is entitled to judgment as a matter of law, the non-moving party may not rest upon general denials but, instead, must submit competent evidence in compliance with Rule 74.04, setting forth specific facts demonstrating a genuine issue for trial. *Larabee*, 271 S.W.3d at 546.

## Proximate Cause

In their first point on appeal, appellants argue that the trial court's grant of summary judgment was in error because there are disputed facts relating to whether Gaines's alleged negligence was a proximate cause of Kivland's suicide. Appellants' point on appeal is, of necessity, more nuanced. In Missouri, to show causation in a wrongful death case, appellants must prove that the negligence of the defendant "directly cause[d] or 'directly contribute[d] to cause'" plaintiff's death. *Sundermeyer v. SSM Reg'l Health Servs.*, 271 S.W.3d 552, 555 (Mo. banc 2008) (quoting *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 863 (Mo. banc 1993)). However, in Missouri, unless the tort victim is insane as a result of the negligence, suicide is seen as a voluntary, independent, and intervening act that destroys the chain of causation linking the negligence of the defendant to the death of the plaintiff. *Beer v. Upjohn Co.*, 943 S.W.2d 691, 693 (Mo. App. E.D. 1997); *Neurological Med., Inc. v. Gen. Am. Life Ins. Co.*, 921 S.W.2d 64, 67 (Mo. App. E.D. 1996). Ultimately, these and any Missouri opinion discussing suicide and its impact upon the issue of proximate cause should recognize the origin of this analysis in the state of Missouri by our Missouri Supreme Court in *Wallace v. Bounds*, 369 S.W.2d 138 (Mo. 1963) where, at pages 143-144, our Missouri Supreme Court stated:

Suicide, due to a mind disordered by an accident or injury or even by an assault accompanied by mental torture, has been held not so related to the wrongful acts as to furnish a ground for the action, where the act of suicide of the insane person is **voluntary** and done with the knowledge of its purpose and physical effect; but where, as the proximate result of the injury the person injured becomes insane **and** bereft of reason, and while in this condition and as a result thereof he takes his own life, his act being **involuntary**, the act causing the injury has been held to be the proximate cause of death.

(Emphasis added.)

In this context, a person is insane when (1) a condition caused him to not understand what he was doing or understanding the “inevitable or proper consequences” of his actions or (2) he suffered from an insane impulse which “prevented reason from controlling his or her actions.” *Neurological Med., Inc.*, 921 S.W.2d at 67. The question has always been whether defendant’s actions caused the victim to become “‘insane and bereft of reason’ such that the victim *involuntarily* commits suicide.” *Stafford v. Neurological Med., Inc.*, 811 F.2d 470, 473 (8<sup>th</sup> Cir. 1987) (citing *Wallace*, 369 S.W.2d at 143-44) (emphasis added). In other words, the precedent is not focused on the diagnosis of “insanity” as much as requiring evidence of mental defect that robs the tort victim of the ability to voluntarily make a conscious choice involving the act of suicide.

Appellants argue that Kivland was acting involuntarily when he took his life. Respondents disputed this contention. Typically, the existence of such disagreement would defeat a motion for partial summary judgment. *State ex rel. Nixon v. Hughes*, 281 S.W.3d 902, 906 (Mo. App. W.D. 2009) (stating that to prevail on a summary judgment claim, the movant must demonstrate that there is no dispute as to the material facts). However, appellants are required to do more than simply *dispute* the fact at issue; they must provide *evidentiary support* for the facts upon which they are relying to establish a factual issue requiring a trial. *Ascoli v. Hinck*, 256 S.W.3d 592, 596 (Mo. App. W.D. 2008). The only evidence appellants presented on the issue of Kivland’s insanity was their expert witness, Dr. Jarvis. However, on November 19, 2008, the trial court sustained respondents’ motion to strike by limiting Dr. Jarvis’s testimony in the following manner:

Michael Jarvis shall not be permitted to testify at the trial of this matter as an expert on the issue that:

- alleged negligence of the Defendants caused Gerald Kivland to become insane in the sense that 1) the insanity prevented the [sic] Gerald Kivland from understanding what he was doing or understanding its inevitable or proper

consequences, or 2) Gerald Kivland's act of suicide was the result of an insane impulse that prevented reason from controlling his actions; or  
- that Gerald Kivland was insane.

In other words, the trial court's ruling on the motion to strike effectively prevented Dr. Jarvis from testifying in this proceeding that Kivland's suicide was not the product of a voluntary act.

If appellants do not have evidence from other sources to substantiate their claim on the issue that Kivland was acting involuntarily when he committed suicide, the claims that are based on Kivland's untimely death fail as a matter of law. *Id.* They did not.

For example, Kivland's wife, Jana Kivland, testified:

Q: Why don't you tell me how clear-minded your husband was, that you were just going to say?

A: And sensitive. The day after he died I got a card in the mail, and he had purchased it, actually it's – so part of it was preprinted about, the gist of it was 'from the moment you and I left we two were one,' and then inside there he had taped the key to the condominium. He didn't want that key to be floating around out there, you know. If you're depressed you don't think like that, and the doctors felt it was euthanasia not suicide.

. . . .

A: . . . he obviously looking back had this planned. He took his life in his own hands I think rather than took his life, because there isn't a doctor or man that I've talked to that haven't said that it is obviously euthanasia and it's too bad you couldn't have held his hand while he took some pills . . . And it truly – I know it wasn't suicide, it was euthanasia.

Kivland's daughter, Kristin Bold testified:

A: I believe that the reason he killed himself is because he had exhausted all medical treatments. He had been told that there was nothing to better his situation and it would only worsen. He knew that meant bed sores and worsening pain and swelling, and with the shoulders giving out that he would be more just like a quadriplegic in bed, and that he didn't want the burden of that to be placed on my mom, he didn't want me to see that.

Q: What else?

A: That I believe he was of clear mind and knew exactly what he was doing and it was more like euthanasia.

The lay testimony suggested that Kivland was in control and knew exactly what he was doing in voluntarily participating in a conscious act of “euthanasia” to spare himself and those that he cared about most from a remaining lifetime of misery.<sup>3</sup> Because of this, Dr. Jarvis’s testimony was necessary to respond to the argument that Kivland’s allegedly voluntary act of suicide constituted an intervening cause destroying the proximate causation link to the respondents as to the wrongful death and lost chance of survival counts.

A review of the trial court’s judgment sustaining the partial summary judgment motion demonstrates that the motion was granted precisely because Dr. Jarvis’s expert testimony was no longer available on the contested issue:

Notwithstanding the fact that Dr. Jarvis’ testimony was limited by the November 19, 2008 order of this court, it is clear that Plaintiffs intend to go forward with their case without any other expert witness to establish that Gerald Kivland’s act of suicide was the result of an insane impulse which prevented reason from controlling his actions.

In its order of November 19, 2008, the trial court explains the rationale for refusing to consider Jarvis’s testimony on the integral issue of whether Kivland’s suicide was voluntary or involuntary:

Although Dr. Jarvis’ affidavit and deposition testimony claimed to be within reasonable medical certainty, he admittedly had no basis, factually or scientifically, for his opinions. All the facts presented by Plaintiffs in this case, however,

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<sup>3</sup> While our function today is not to express social commentary on the topic of suicide, this court is comprised of human beings, not robots. Our discussion of the issue of “voluntary vs. involuntary” is mandatory to a competent legal discussion of the topic before us, but it does not lessen the empathy this court feels for the Kivland family. And, certainly, the fact that Kivland’s pain was so immense that he chose to end his life will be relevant at the trial of the remaining counts in the underlying action as to the issue of the degree of pain (i.e. non-economic damage) that Kivland alleges to have sustained as a direct result of the alleged negligent acts.

undisputed by Dr. Jarvis, showed him that Kivland was not insane or operating under any form of depression or psychosis during the time between Dr. Gaines' surgery and the date of [Gerald's] death.

For a person such as Dr. Jarvis to be qualified as an expert, Mo.Rev.Stat. § 490.065 requires him to rely on facts and data of a type reasonably relied on by experts in his field and the facts and data must be otherwise reasonably reliable . . . Without a medical diagnosis for Kivland, *the statements in Dr. Jarvis's affidavit and deposition testimony become only personal opinions, not scientific conclusions.*

(Emphasis added.)

The trial court rejected all of Dr. Jarvis's testimony so far as it related to the issue of whether Kivland's suicide was involuntary because he was insane or otherwise suffering from mental defect influencing the voluntariness of Kivland's act of suicide. We also note that appellants' contention that the trial court granted partial summary judgment because their expert failed to use the "magic word" of "insanity" is not supported by the facts. The trial court's objection to Dr. Jarvis's testimony and the limitation of that testimony were not rooted in a slavish demand that Dr. Jarvis utilize the term "insane." Instead, the trial court rejected Dr. Jarvis's testimony because he did not use the facts of Kivland's suicide and the events preceding it to provide a medical diagnosis of a mental illness that would have caused Kivland's suicide to be involuntary. That Dr. Jarvis was not prepared to provide this diagnosis is apparent from a reading of his deposition transcript:

Q: And would you agree there is no evidence of any psychiatric – that you have no psychiatric diagnosis for Mr. Kivland during those final moments before his death, is that correct?

A: That's correct.

....

Q: I want to try to summarize and make sure I understand your opinions. Basically, you are saying that there is no evidence that Mr. Kivland was depressed and there is no evidence that he had any psychiatric, diagnosable ailment at the time that he took his life, is that correct?

A: Correct.

It is clear from the transcript that Dr. Jarvis was not prepared to testify that Kivland suffered from a mental defect that prohibited his actions from being “voluntary.” The inability of Dr. Jarvis to provide a medical diagnosis for Kivland is distinct from Dr. Jarvis being unwilling to diagnose Kivland as “insane.” We do not interpret the trial court’s order, and do not hold here, that it is necessary for an expert to use the term “insane” when testifying to whether an individual was legally insane or suffering from an insane impulse when they committed suicide. *Stafford*, 811 F.2d at 473. However, for these claims to survive summary judgment, Dr. Jarvis had to be available to testify that the victim was suffering from a mental disease that caused Kivland’s suicide to be involuntary.<sup>4</sup> Dr. Jarvis was not prepared to testify in this manner, and as such, the trial court acted within its discretion to restrict Jarvis’s testimony. *Thomas v. Festival Foods*, 202 S.W.3d 625, 627 (Mo. App. W.D. 2006).

As appellants note, the *Stafford* court opines that Missouri does not require a witness to say the magic words “insane”; however, the court in *Stafford* did require the expert witness to provide a diagnosis of a mental illness that met Missouri’s definition of insanity. 811 F.2d at 473 (“Under

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<sup>4</sup> To the extent the trial court’s judgment is interpreted to suggest that an expert witness is required to testify to Kivland’s insanity in this case because it is a medical malpractice claim, we disagree. An expert is required for a tort claim based upon medical negligence to prove that the health care provider deviated from the standard of care. § 538.225 RSMo Cum. Supp. 2005. However, an expert is not required for *every* issue in such a case. In regards to suicide:

A lay witness is permitted to give an opinion as to a person’s sanity where the witness relates facts upon which the opinion is based which are inconsistent with sanity. The facts which form the basis of the opinion must go beyond mere sickness, old age, peculiarities, or eccentricities. In determining whether certain ‘facts’ are inconsistent with sanity, the trial court looks at whether the person alleged to be insane displays psychotic behavior that is easily discernable by a lay person.

*Skaggs v. Aetna Life Ins. Co.*, 884 S.W.2d 45, 47 (Mo. App. E.D. 1994) (citations omitted). But, as we believe the trial court was noting in its judgment, the appellants failed to provide *any* competent evidence, lay or expert, that created a genuine dispute as to the voluntariness of Kivland’s act of suicide.

Missouri law, when a person's actions cause a victim to become 'insane and bereft of reason' such that the victim involuntarily commits suicide, the person's actions could constitute the proximate cause of death. An 'irresistible impulse' is a form of insanity that can lead to an involuntary suicide."). As *Stafford* highlights, in Missouri, the issue of involuntariness is inextricably intertwined with the question of "insanity." Consequently, when the trial court limited Dr. Jarvis from testifying that Kivland was insane or suffering from an insane impulse, it prevented Dr. Jarvis from testifying that Kivland's suicide was involuntary. Thus, in contrast to *Stafford*, appellants presented no competent evidence that could show that Kivland's suicide was an involuntary act. Without such evidence, appellants' claim fails, and the trial court's partial grant of summary judgment was proper.

### **Constitutional Challenge**

Appellants' second point on appeal is that the trial court's judgment restricts the open courts provision of the Missouri Constitution by unreasonably restricting a recognized cause of action. This point is founded on the assumption that summary judgment was granted because of the appellants' failure to provide an expert witness to say the "magic word" of "insanity." As we have discussed above, we do not find that the trial court's judgment was based upon a failure of the appellants to use "magic words" but, instead, because appellants were unable to provide evidence to support their argument that Kivland's act of suicide was the product of an involuntary act caused by mental defect. The trial court did not, thus, unreasonably restrict the appellants in their attempt to pursue recognized causes of action. The trial court rightfully required competent evidence on the topic of whether Kivland's act of suicide was involuntary. Absent the production of such evidence, the trial

court correctly sustained respondents' motion for partial summary judgment. Consequently, appellants' second point on appeal is without merit.

The trial court's judgment on the motion for partial summary judgment is affirmed.

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Mark D. Pfeiffer, Judge

Karen King Mitchell, Presiding Judge, and  
James E. Welsh, Judge, concur.